

07-3100-ag

07-3617-ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHURCH HOMES, INC. d/b/a AVERY HEIGHTS
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

NEW ENGLAND HEALTH CARE EMPLOYEES UNION,
DISTRICT 1199, SEIU
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review and a cross-application for enforcement of the Order of National Labor Relations Board (“the Board”) issued against Church Homes, Inc. d/b/a/ Avery Heights (“Avery”) in *Church*

Homes, Inc. d/b/a/ Avery Heights, 350 NLRB No. 21, 2007 WL 1946623 (June 29, 2007). (A 42-46.)¹ The New England Health Care Employees Union, District 1199, SEIU (“the Union”), has intervened on the Board’s behalf. The Order is final with respect to all parties.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over these consolidated cases under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice was committed in Connecticut. Avery’s petition and the Board’s cross-application were timely because the Act imposes no time restrictions on the filing of review or enforcement proceedings.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that Avery, in hiring permanent replacements, was unlawfully motivated by a desire to punish the strikers and break the Union’s solidarity, and therefore violated Section 8(a)(3) and (1) of the Act when it refused to reinstate the permanently-replaced strikers upon their unconditional offer to return to work.

¹ “A” references are to the parties’ joint appendix. References preceding a semicolon are to the Board’s findings; those following a semicolon are to supporting evidence.

STATEMENT OF THE CASE

In its Supplemental Decision and Order currently under review, the Board accepted this Court's remand in *New England Health Care Employees Union, District 1199, SEIU, AFL-CIO v. NLRB*, 448 F.3d 189 (2d Cir. 2006), as law of the case, and examined the record evidence that the Court identified as potentially relevant. On the basis of that assessment, the Board found (A 42-46) that Avery's refusal to reinstate the permanently-replaced strikers upon their unconditional offer to return to work violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). The facts supporting the Board's finding are detailed below, followed by summaries of the Board's initial decision, the Court's opinion, and the Board's Supplemental Decision and Order.

I. STATEMENT OF FACTS

As the Court stated in its decision, *New England Health Care Employees Union*, 448 F.3d 189, Avery is a nursing home and assisted living facility for about 500 adults in Hartford, Connecticut. Since the early 1970s, the Union has been the certified bargaining representative for a unit of all service and maintenance employees at Avery. In late September 1999, Avery and the Union began negotiations for a successor collective-bargaining agreement. *Id.* at 190.

On November 17, about 180 to 185 employees, nearly the entire unit, began an economic strike after Avery and the Union were unable to agree on a new

contract. For several weeks, Avery carried on operations by relying on nonstriking employees, managers, temporary employees, and volunteers. About December 15, Avery began hiring permanent replacements, both directly and through outside agencies that charged substantial fees. Avery paid the permanent replacements an hourly wage higher than it was offering the strikers, but less than it was paying its temporary workers, and less than what the Union had demanded at the bargaining table. *Id.*

Avery made a conscious decision to tell the Union nothing about its hiring of permanent replacements, and took active measures to keep its replacement campaign a secret while hiring as many permanent workers as it could before the Union caught on. *Id.* Avery's director of operations, for instance, told Scott Cohen, the owner of a temporary agency supplying employees to Avery, that Avery's plans for hiring permanent replacements were to be kept "hush-hush" because Avery needed to get as many bodies hired as it could before the Union found out. *Id.* at 195. On December 31, Norman Harper, Avery's CEO, sent a memo to Avery's Board of Directors, which stated:

As a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are very pleased to have the job for the money we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time If [the Union] refuses to seriously negotiate in good faith, we

plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery.

Id. at 194-95. By late December, the Union received reports and discovered other clues indicating that Avery was hiring permanent replacements, and arranged a meeting with Avery and a federal mediator for January 3, 2000. At that meeting, Avery disclosed that it had hired “over 100” permanent replacements. *Id.* at 190.

On January 5, the Union made an offer to return to work on behalf of the strikers. Avery noted that the offer was not unconditional. On January 20, the Union renewed the offer, this time making it unconditional. Avery began recalling strikers to positions that had not been filled by permanent replacements, ultimately reinstating about 78 or 79 strikers. *Id.*

II. THE BOARD’S INITIAL DECISION

After an investigation of an unfair labor practice charge filed by the Union, the Board’s General Counsel issued a complaint alleging, among other things, that Avery violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work. After a hearing, the administrative law judge found the violation based on his conclusion that Avery’s hiring of permanent replacements was unlawfully motivated by a desire to punish the strikers and to break the Union’s solidarity. *Church Homes, Inc. d/b/a/ Avery Heights*, 343 NLRB 1301, 1333-34 (2004). The judge based that conclusion on evidence

demonstrating Avery's deliberate plan to keep the hiring secret from the Union, as well as Avery's failure to proffer a credible rationale for its secrecy. *Id.*

On review, the Board (Chairman Battista and Member Schaumber, Member Walsh dissenting) reversed and dismissed the complaint allegation, finding that the General Counsel had failed to demonstrate that Avery acted with an unlawful motive. *Id.* at 1305-08.² The Board majority found that Avery's failure to disclose its hiring of permanent replacements was not evidence of an unlawful motive because Avery had no legal obligation to make that disclosure. *Id.* at 1306-07. The majority reasoned that, given that an employer has no duty to notify a union when it hires striker replacements, it may legitimately hire them in secret because one valid objective of such hiring--namely, to enhance the employer's ability to withstand the strike--does not depend on making the strikers aware that they are being replaced. *Id.* at 1306. The majority also concluded that Avery's goal in hiring replacements was to exert economic pressure on the Union. *Id.* at 1306-07.

² The Board also found that Avery violated Section 8(a)(3) and (1) of the Act by discharging employees Opal Clayton, Patricia Hurdle, and Georgia Stewart because of their union activities. Avery did not contest those unfair labor practice findings, and a Board compliance proceeding recently determined the amounts of backpay owed to those employees. *See Church Homes, Inc. d/b/a/ Avery Heights*, 349 NLRB No. 81, 2007 WL 1279487 (Apr. 27, 2007). That backpay proceeding is not before the Court.

III. THE COURT'S DECISION

The Union filed a petition for review challenging the Board's finding that Avery was not motivated by an independent unlawful purpose in secretly hiring permanent employees to replace the strikers. Granting the petition, and remanding the case for further consideration, the Court (now Chief Judge Jacobs, and Circuit Judges Leval and Straub) concluded that "the Board made a central and unwarranted inference that renders its conclusion arbitrary and capricious." *New England Health Care Employees Union*, 448 F.3d at 189-90, 193. Specifically, the Court stated that, although an employer has no legal obligation to inform strikers before hiring permanent replacements, it was unwarranted for the Board to conclude, on that basis alone, that "an employer's decision to keep the hiring of permanent replacements secret is not probative of whether the employer had an independent unlawful purpose for the hiring." *Id.* at 195.

The Court explained that "logic suggests that an employer seeking to enhance its bargaining leverage by hiring permanent replacements would have every incentive to publicize the effort." *Id.* "Conversely," the Court stated, "employers with an illicit motive to break a union have a strong incentive to keep the ongoing hiring of permanent replacements secret." *Id.* Indeed, the Court, referencing the facts of this case, noted that the "replacement of over half of a unionized workforce with nonunion workers would devastate the union's power and credibility." *Id.*

The Court further explained that the Board failed to “consider what the purpose of [Avery’s] secrecy could have been,” and therefore there was “no apparent basis for the Board’s conclusion that ‘the non-disclosure did not have an illicit motive.’” *Id.* at 196 (quoting 343 NLRB at 1307). The Court recognized that there may be “legitimate explanations for secrecy,” such as “a fear of picket-line violence,” but that the Board “made recourse to none.” *Id.* at 196. The Court therefore concluded that “the Board erred because it failed to acknowledge the natural and logical implications of the facts it credited and the analytic framework it adopted.” *Id.*

The Court explained that its opinion was narrow and “does not preclude the Board on remand from reaching the same conclusion through adequate reasoning.” *Id.* The Court instructed, however, that, “[i]f the [Board] concludes that Avery has refuted the logical implication that its secrecy was illicitly motivated, the [Board] should set forth the analysis supporting this conclusion.” *Id.* at 196 n.7. The Court noted that, on remand, the Board may consider the additional record evidence that Avery had urged the Court to consider, and that the Board may “decline to accept the [administrative law judge]’s negative credibility finding with respect to the evidence that Avery submitted suggesting that fear of picket line violence motivated its decision to keep [its hiring] secret.” *Id.*

IV. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

The Board accepted the Court's remand as law of the case, invited the parties to file position statements, and examined the record evidence in light of the Court's remand instructions. On June 29, 2007, the Board (Chairman Battista and Members Schaumber and Walsh) issued its Supplemental Decision and Order, finding that Avery's refusal to reinstate the permanently-replaced strikers upon their unconditional offer to return to work violated Section 8(a)(3) and (1) of the Act. (A 42.) Specifically, the Board proceeded from the Court's finding that the logical implication of Avery's secrecy, absent any countervailing evidence, was that it had an illicit motive for hiring permanent replacements. The Board then effectuated the Court's instruction to determine whether Avery had presented evidence adequate to refute that logical implication, and found that Avery had proffered insufficient evidence to do so. (A 43-45.)

The Board's Order requires Avery to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires Avery to offer the permanently-replaced strikers full reinstatement to their former jobs and to make them whole for all losses suffered as a result of Avery's discrimination. The Order also requires Avery to remove any reference to its unlawful failure to reinstate those

striking employees from its files, and to post a remedial notice to employees. (A 45.)

SUMMARY OF ARGUMENT

The Board faithfully adhered to the terms of the Court's remand, and after a thorough assessment of the record evidence that the Court identified as potentially relevant, the Board reasonably concluded that Avery had failed to rebut the inference that it possessed an unlawful motive for its secret hiring of permanent replacements. Substantial evidence therefore supports the Board's finding that Avery violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the permanently-replaced strikers upon their unconditional offer to return to work.

Avery's only direct challenges to the Board's evaluation of the record evidence are attacks on the Board's upholding of the administrative law judge's discrediting of the testimony of Avery's administrator, Dr. Parker. Avery's arguments in this vein must be rejected for the simple reason that it has failed to recognize, let alone meet, this Court's standard for reversing credibility determinations. Also utterly unavailing are Avery's remaining arguments, which consume the bulk of its brief, and which either mistakenly take issue with matters put to rest by the Court's earlier opinion, or wrongly assert that the Board misunderstood its task on remand. Accordingly, Avery presents no basis to disturb the Board's unfair labor practice finding, which is entitled to enforcement.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT AVERY, IN HIRING PERMANENT REPLACEMENTS, WAS UNLAWFULLY MOTIVATED BY A DESIRE TO PUNISH THE STRIKERS AND BREAK THE UNION’S SOLIDARITY, AND THEREFORE VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT REFUSED TO REINSTATE THE PERMANENTLY-REPLACED STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Applicable Principles

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The right of employees to engage in primary strike activity in support of economic demands is fundamental to the Act. Indeed, this right is expressly recognized in Section 13 of the Act (29 U.S.C. § 163): “Nothing in this [Act] shall be construed . . . to interfere with or impede or diminish in any way the right to strike”

To implement Section 7’s guarantee, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their Section 7 rights. Further, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any

term or condition of employment to . . . discourage membership in any labor organization.”

Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates Section 8(a)(3) and (1) of the Act unless it can demonstrate that it acted to advance a “‘legitimate and substantial business justification.’” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)). The hiring of permanent replacement workers constitutes such a justification, and therefore “an employer may refuse to reinstate economic strikers if in the interim he has taken on permanent replacements.” *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972). *Accord Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 387, 389, 393 (D.C. Cir. 1995).

Nonetheless, an employer violates the Act “if ‘an independent unlawful purpose’ motivated [its] hiring of permanent replacements.” *New England Health Care Employees Union, District 1199, SEIU, AFL-CIO v. NLRB*, 448 F.3d 189, 192 (2d Cir. 2006) (quoting *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964)). As with other elements of an unfair labor practice, the Board’s General Counsel cannot prevail without showing that the employer had an independent unlawful purpose. *See NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 401 (1983).

The Board’s findings of fact are “conclusive” “if supported by substantial evidence on the record considered as a whole.” Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera*, 340 U.S. at 488. As the Court has recognized, it “may not ‘displace the Board’s choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before [it] de novo.’” *Newspaper Guild of New York, Local No. 3 v. NLRB*, 261 F.3d 291, 301 (2d Cir. 2001) (quoting *G&T Terminal Packaging Co.*, 246 F.3d at 114, internal quotation marks omitted). Therefore, “the findings of the Board ‘cannot lightly be overturned,’ especially when these findings are based upon the Board’s assessment of witness credibility.” *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973)).

B. The Board Reasonably Found that Avery Failed To Proffer Evidence Sufficient To Refute the Inference that It Acted with an Unlawful Motive in Hiring the Replacements

In rendering its decision, the Board faithfully adhered to the terms of the Court’s remand. As noted at pp. 7-8, the Court concluded that the Board, in its initial decision, had erred because “it failed to acknowledge the natural and logical implications of the facts it credited,” which the Court held logically supported an inference that Avery’s deliberate concealment of its hiring of permanent replacements was “illicitly motivated.” *New England Health Care Employees*

Union, 448 F.3d at 196 & n.7. Accordingly, the Court remanded the case to the Board to consider the record evidence in light of whether “Avery has refuted the logical implication that its secrecy was illicitly motivated.” *Id.* at 196 n.7. *See* p. 8.

The Court noted that the Board, in making that assessment on remand, may “decline to accept the [administrative law judge]’s negative credibility finding with respect to the evidence that Avery submitted suggesting that fear of picket line violence motivated its decision to keep [its hiring] secret.” *Id.* The Court also cited additional evidence that the Board might consider on remand which Avery had argued might suggest that it did not possess an independent unlawful motive, including that Avery (1) demonstrated an ongoing willingness to negotiate a contract with the Union; (2) agreed to a request by the Mayor of Hartford that it stop hiring additional permanent replacements while his strike mediation efforts were ongoing; and (3) solicited the Union’s input on how best to recall strikers who had not been permanently replaced, and then followed the Union’s suggestions. *Id.* *See* pp. 8-9.

On remand, the Board faithfully adhered to those terms of the Court’s remand and thoroughly assessed the relevant record evidence. As the Board explained, “[w]e have accepted the [C]ourt’s remand, and recognize—as law of the case—the [C]ourt’s finding that the logical implication of [Avery]’s secrecy was an illicit motive.” (A 43.) The Board further explained that it “reviewed the record,

including the facts highlighted by the [C]ourt,” and found that “the record is insufficient to refute the inferred unlawful motive.” (A 43-44.) The Board (A 44-45) undertook an extensive review of the record evidence, and assessed each of the evidentiary issues that the Court suggested that the Board might address on remand.

As the Court suggested, the Board reviewed (A 44) the administrative law judge’s credibility determination of the testimony of Avery’s administrator, Dr. Miriam Parker, that she kept Avery’s hiring secret because she feared the Union would engage in picket-line violence or impede Avery’s hiring efforts. As the Board noted (A 44), the judge discredited Parker’s testimony based on the judge’s “evaluation of her demeanor and the absence of evidence corroborating her claimed fear of violence.” Noting that it had previously affirmed that credibility determination in its initial decision, the Board nonetheless “carefully reviewed the record,” and again “affirm[ed] that finding as consistent with the record as a whole.” (A 44.) Having done so, the Board concluded that “Parker was not credible and the record is devoid of evidence that would lend credence to Parker’s claim.” (A 44.) Moreover, the Board found (A 44) that “other record evidence undercuts her claim,” namely, CEO Harper’s memo to the board of directors espousing the advantages of hiring replacements, and the testimony of Cohen, the owner of a temporary agency, that he had been told that the hiring needed to be kept

“hush-hush”—neither of which mentioned a fear of violence as the reason for Avery’s secrecy. *See* pp. 4-5.

The Board also reviewed (A 44-45) the three additional evidentiary matters proffered by Avery, finding that evidence “insufficient to refute the [C]ourt’s finding that the logical inference from [Avery]’s secrecy was an illicit motive.” (A 44.) First, the Board found (A 44) that Avery’s argument that its lawful conduct at the bargaining table showed it had no unlawful motive “fails as a matter of law and logic.” As the Board rightly noted (A 44), that contention “boils down to a suggestion that because [Avery] did not violate its duty to bargain under Section 8(a)(5) [of the Act], its unexplained secret hiring of permanent replacements could not have violated Section 8(a)(3).”

The Board also reasonably rejected (A 44-45) Avery’s other two evidentiary contentions that its lack of illicit motive is shown by its agreement in late January 2000 to a 10-day hiatus in hiring permanent replacements at the request of the Mayor, and its solicitation and acceptance of the Union’s advice on how best to recall strikers after the January 20 unconditional offer to return to work. As the Board noted (A 44-45), those actions were taken one month *after* Avery began hiring replacements, and by then, Avery had already replaced over *half* of the bargaining unit. Accordingly, the Board reasonably found (A 45) that the additional evidence raised by Avery “fails to establish that [it] did not possess an

unlawful motive for its secret hiring of permanent replacements,” and concluded that, “under the terms of the [C]ourt’s remand,” Avery violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently-replaced economic strikers upon their unconditional offer to return to work.

C. Avery Presents No Viable Challenge to the Board’s Assessment of the Relevant Record Evidence

Surprisingly few of Avery’s challenges to the Board’s decision directly address the key issue of whether the Board reasonably examined the record evidence that the Court identified as potentially relevant in determining whether Avery had refuted the inference that it acted with an illicit motive. Indeed, Avery makes no argument directly challenging the Board’s assessment (A 44-45) of the additional evidence cited by the Court, limiting its contentions to attacks on the Board’s credibility determination regarding Dr. Parker’s testimony. None of its contentions, however, presents any basis to disturb the Board’s finding.

Avery’s attempts (Br 2, 11-12, 13, 22, 24-27), for example, to rehabilitate Dr. Parker’s discredited testimony are untenable. Those contentions must be rejected for the simple reason that Avery has failed to recognize, let alone meet, this Court’s standard for reviewing the Board’s credibility findings. As this Court has repeatedly explained, the Board’s credibility determinations will not be set aside unless it is demonstrated that they are “‘hopelessly incredible,’” or they “‘flatly contradict . . . undisputed documentary evidence.’” *NLRB v. S.E. Nichols, Inc.*, 862

F.2d 952, 956 (2d Cir. 1988) (quoting *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982)).

As shown at pp. 15-16, the Board affirmed (A 44) the administrative law judge's discrediting of Parker's testimony, concluding that Parker was not credible, and that the record is devoid of evidence that would lend credence to her claim-- which was, in fact, *undercut* by the undisputed documentary evidence of CEO Harper's December 31 memo, and the credited testimony of Cohen. Contrary to the Board's detailed review of the judge's discrediting of Parker's testimony, Avery oddly and incorrectly persists (Br 12, 13, 24, 27) in claiming that the Board "summarily reject[ed] Dr. Parker's testimony because it was hearsay."

Avery's assertion (Br 22) that the administrative law judge did not assess Parker as a witness on the basis her demeanor is also mistaken. Indeed, the judge earlier discredited the bulk of Parker's extensive testimony regarding Avery's reasons for discharging three strikers, finding the discharges unlawful. 343 NLRB at 1319-23. On review, the Board affirmed those unfair labor practice findings *on the basis* of the judge's discrediting of Parker (*see id.* at 1302), and Avery did not pursue court review of those unlawful discharge findings. Therefore, the judge had more than just a passing opportunity to assess Parker's demeanor and credibility. In turn, the Board found (A 44) ample support for affirming the judge's discrediting of

Parker’s claimed reason for Avery’s secrecy as being “consistent with the record as a whole.”

Lastly, because Avery has presented the Court with no basis to disturb the Board’s discrediting of Parker, the Court need not reach Avery’s summarily-raised suggestion (Br 28) that the Court should remand the case so that Avery “be given an opportunity to offer additional evidence further detailing the reports [of violence] Dr. Parker received.” In any event, Avery had the opportunity, before the Board on remand, to move for a reopening of the record. Having failed to do so, Avery now, in effect, asks only for a second bite at the apple.

D. Avery’s Remaining Contentions Are Meritless

The bulk of Avery’s remaining challenges either mistakenly take issue with matters put to rest by the Court’s earlier opinion, or wrongly assert that the Board misunderstood its task on remand. Avery contends (Br 19, 22, 23, 24), for example, that the Board’s original decision—the one that the Court vacated in *New England Health Care Employees Union*, 448 F.3d 189—was the correct decision. As such, that contention amounts to little more than a request that the Court reconsider its prior opinion, something that would have required either a petition for rehearing, or a petition for a writ of certiorari, in the earlier case. Avery, however, pursued neither course of review.

Many of Avery's other contentions rely on its view of the facts that the Court previously rejected, and are therefore of no consequence. For instance, Avery surreptitiously attacks the facts recognized by the Court in its original opinion by mischaracterizing the Board's unfair labor practice finding (A 43-45) in contending that the Board "improperly held that Avery violated the Act *by simply not disclosing* its hiring plans." (Br 22, emphasis added.) But, as this Court appreciated, this case was not limited to a *passive* nondisclosure of its hiring. Rather, it was Avery's *active* and deliberate plan to conceal its hiring that animated the Court's result. *See* 448 F.3d at 190, and p. 4.

Arguing that the Board misunderstood its task on remand, Avery attempts (Br 2, 3, 4, 13, 18, 28) to place great significance on comments made by Chairman Battista and Member Schaumber in a footnote (*see* A 43 n.6), in which they express their individual views of the Court's decision. To the contrary, as shown at pp. 13-17, the Board fully implemented the Court's remand as the law of the case, thoroughly assessed the record evidence as the Court instructed, and on that basis reasonably concluded that Avery had unlawfully refused to reinstate the permanently-replaced strikers. Moreover, such comments and statements of disagreement expressed by the Board or individual Board members are fairly common in remand cases in which the Board and a court have disagreed, and do not affect the Board's application of the court's remand determination as the law of the

case. *See, e.g., Armco, Inc.*, 298 NLRB 416, 418 (1990) (the Board accepted the court's determinations as the law of the case, but expressed its continuing disagreement with the court's conclusions, and stated adherence to its own view); *Shaw's Supermarkets, Inc.*, 303 NLRB 382, 382 (1991) (same).

Avery also incorrectly claims (Br 2, 3, 4, 13, 18, 28) that the Board found that "Avery bears the burden of *proving* that it had a legitimate reason" for its secrecy. (Br 28, emphasis added.) The Board made no such finding. Indeed, given the Court's holding that the logical implication of Avery's deliberate concealment of its hiring was that Avery was acting with an unlawful motive (*see* 448 F.3d at 196), the key inquiry on remand, as the Court explained, was whether "Avery has *refuted* the logical implication that its secrecy was illicitly motivated." *Id.* at 196 & n.7 (emphasis added). As shown at pp. 14-15, this was the exact inquiry undertaken by the Board, and the Board reasonably concluded (A 44) that Avery proffered evidence insufficient to refute the inference that its hiring was illicitly motivated.

Finally, Avery's reliance (Br 18-19) on *Supervalu, Inc.*, 347 NLRB No. 37, 2006 WL 1662526 (June 13, 2006), does not further its position because it is factually distinct, and in no other way illuminating. In that case, unlike here, the Board found "no persuasive evidence" that the employer had an unlawful motive in hiring replacements. *Id.* at 2006 WL 1662526, at *27. That is, the Board found that, without more, evidence of an employer's "efficiency and speed" in hiring

permanent replacements is insufficient to “demonstrate an independent unlawful motive.” *Id.* Here, Avery’s deliberate plan to keep its hiring secret from the Union and actively conceal it stand in strong contrast.

Accordingly, the Board’s finding that, under the facts of this case, Avery violated Section 8(a)(3) and (1) of the Act by failing to reinstate the permanently-replaced economic strikers upon their unconditional offer to return to work is supported by substantial evidence. The Board’s Order, therefore, is entitled to enforcement.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Avery's petition for review and enforcing the Board's Order in full.

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NATIONAL LABOR RELATIONS BOARD

December 2007

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHURCH HOMES, INC. d/b/a AVERY)	
HEIGHTS)	
)	
Petitioner/Cross-Respondent)	Case Nos. 07-3100-ag
)	& 07-3617-ag
v.)	
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)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
NEW ENGLAND HEALTH CARE)	
EMPLOYEES UNION, DISTRICT 1199, SEIU)	
)	
Intervenor)	
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its proof brief contains 5,046 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 15th day of February 2008

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**CERTIFICATE OF COMPLIANCE WITH CONTENT
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Pursuant to Local Rule 32, the Board certifies that the PDF copy of its proof brief submitted to the Court as an e-mail attachment to <briefs@ca2.uscourts.gov> was scanned for viruses using Symantec Antivirus Corporate Edition, program version 8.00.9374 (1/10/2007 rev. 32), and found free of viruses.

Dated at Washington, DC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date served by first-class mail two copies of the Board's proof brief by first-class mail upon the following counsel at the addresses listed below:

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